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No. 08-322

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General
of the United States of America, *et al.*,

Appellees.

**On Appeal From The United States
District Court For The District Of Columbia**

BRIEF FOR APPELLEE TRAVIS COUNTY

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QUESTIONS PRESENTED

1. Whether Section 4(a) of the Voting Rights Act authorizes a limited-purpose local governmental district, without authority to register voters, to seek judicial termination of the district's obligations under Section 5 of the Act.

2. Whether Section 5 of the Voting Rights Act is "appropriate legislation" under the Fourteenth or Fifteenth Amendment's congressional enforcement provisions.

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STATEMENT OF THE CASE

This case concerns Sections 4 and 5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("2006 VRA Reauthorization"), §§ 4 & 5, Pub. L. No. 109-246. The reauthorization became effective on July 27, 2006.

Travis County focuses on the local impact of the 2006 VRA Reauthorization and provides a narrower statement of the case and its context than the briefs of other appellees.[1] The district court rejected the claim that Section 5 of the Act imposes undue burdens on the local government challenger. J.S. App. 150-53. The County addresses why the district court is correct, and the challenger wrong, about the continuing salience and viability of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

A. The MUD's creation, demographics, and preclearance activity

The Voting Rights Act first became law in 1965. Section 5 of the Act required "covered jurisdictions" to obtain administrative or judicial preclearance of

[1] Travis County adopts the arguments on both Section 4(a) bail-out and Section 5 constitutionality in the Brief for Intervenor-Appellees Texas State Conference of NAACP Branches, *et al.* and the Brief for Intervenor-Appellees Rodney and Nicole Lewis, *et al*.

electoral changes in advance of implementation. *Clark v. Roemer*, 500 U.S. 646, 652 (1991). Texas, however, was not subject to Section 5 requirements until 1975, when Congress amended the Act and Texas became a "covered jurisdiction," required to obtain Section 5 preclearance for all changes affecting voting which were enacted or administered after November 1, 1972. J.A. 393; *see* 40 Fed. Reg. 43,746 (Sept. 23, 1975).

A decade later, a private developer petitioned the state environmental agency for creation of a municipal utility district,[2] to be known as the Northwest Austin Municipal Utility District Number One ("MUD" or "District"), embracing just over 700 acres of undeveloped land at the northwest edge of Travis County. J.A. 394, 402. Its boundaries would coincide with a residential subdivision known as Canyon Creek. J.A. 403.

The state agency approved creation of the MUD in 1986, then re-approved its creation in 1988. J.A.

[2] A "municipal utility district" is a special-purpose local government created under Texas general law, specifically Chapters 49 and 54 of the Texas Water Code, or by special legislation. D. Brooks, *County and Special District Law*, 36A TEX. PRAC. § 46.6, at 123 (2nd ed. 2002). The MUD in this case is created under general law, not by special legislation. J.A. 393. The name of the state environmental agency has changed several times since the mid-1980s. It is currently known as the Texas Commission on Environmental Quality.

394, 396.[3] At the time, only one person lived inside the District boundaries, and, in the ensuing local confirmation election, cast the election's only vote in favor of the District's creation. J.A. 396. The MUD, therefore, officially came into existence in mid-1988.

The population of the District has grown from an estimated twelve people in 1990 to about 3,500 in 2000. J.A. 403-04. It constitutes only a small part, less than one half of one percent, of Travis County's population. Texas State Conf. of NAACP Branches Summary Judg. Mot., Dkt. No. 100, Exh. 3 (Robinson Report). The MUD is substantially less racially diverse than the County as a whole. The combined African-American and Latino population of the district is 7%, compared to 37.2% for the County. *Id*. The District's annual median family income of $103,200 is nearly double that of the County as a whole. *Id*.

The MUD is wholly inside the boundaries of both Travis County and the City of Austin. J.A. 393-94. But, it is not subject to the control or authority of either of them. J.S. App. 18. It is governed by a 5-member board that is elected at-large (though not by numbered place) to 4-year terms in non-partisan contests. J.A. 404-06. It has no employees, and its current governmental functions are limited to providing payment of existing bonds and contracts and

[3] The re-approval appears to have been necessitated by the bankruptcy of the private developer, which precipitated the resignation of the District's interim directors. J.A. 395.

maintenance of the community park and walking trails within the District. J.S. App. 402; MUD Summary Judg. Mot., Dkt. No. 99, Exh. 18 (Ferguson Depo. at 25 & 31).[4]

Since its inception, the MUD has made eight submissions for administrative preclearance under Section 5, stretching over an 18-year span from 1986 to 2004. J.S. App. 408-10; 414. Its last submission was in early 2004. J.A. 412. None drew an objection from the Attorney General. J.A. 390; J.S. App. 413. The annualized cost to the MUD for these submissions was $223. J.S. App. 415.

B. Travis County's role in elections

Among the many local governments based in Travis County, the County itself is the central force in the conduct of elections. Through two of its elected officials – the County Tax-Assessor Collector and the County Clerk – the County is the only entity charged with the responsibility for registering voters in the County and is the principal administrator of elections. J.A. 93 (voter registration); J.A. 87 (conduct elections).

The County Tax-Assessor Collector is statutorily designated the "voter registrar" for all elections. J.A.

[4] Municipal utility districts also have authority to sue to enforce private restrictive covenants. TEX. WATER CODE § 54.237. Nothing in the record indicates that the MUD has exercised this authority.

420; *see* TEX. ELEC. CODE § 12.001. The voter registrar may appoint deputy registrars and volunteer deputy registrars. *Id*. §§ 12.006(a), 13.031(a), 13.046(a). She makes registration eligibility determinations, issues voter registration certificates, hears challenges to registration of voters, and prepares the certified list of registered voters in each precinct in the County. *Id*. §§ 13.071, 13.142, 16.091, 18.001.

The County Clerk is the chief election officer for the County. *Id*. § 31.091(1). She is charged with training poll workers – election judges and election clerks – using a state-developed training program,[5] and this training extends to poll workers selected by the MUD and other local governments in the County. *Id*. §§ 31.093(b), 32.114(a). She also is authorized to contract with other local governments to administer their elections. *Id*. § 31.092(a); ch. 271.

Travis County is under contract with 107 jurisdictions to administer their elections. J.A. 87-88, 398. The MUD is one of these jurisdictions. J.A. 398.[6] The

[5] The Texas Secretary of State sets standards for training election judges. TEX. ELEC. CODE § 32.111(a).

[6] The MUD's arrangement with Travis County does not relieve the MUD of its Section 5 obligations. The joint election contracts are standardized. J.A. 398. They all contain a provision such as the one in the 2006 joint election agreement the MUD entered into with the County, which states: "Each of the Entities shall be individually responsible for obtaining appropriate preclearance, if necessary, from the United States Department of Justice." *See, e.g.,* MUD Summary Judg. Mot., Dkt. No. 99, Exh. 14 (DeBeauvoir Depo. Exh. 5, at 8).

MUD was one of the last local jurisdictions to enter into one of these joint election agreements, and the County administered its first election for the MUD in May 2004. J.A. 398-99.[7] The MUD entered into another joint election agreement with the County for the MUD's May 2006 election. J.A. 399. The MUD obtained preclearance of the 2004 joint election agreement, but apparently not the 2006 agreement. J.A. 410, 400.[8]

C. The MUD's suit, Travis County's intervention, and the District Court's decision

In the summer of 2006, only eight days after the 2006 VRA Reauthorization became law, the MUD filed suit, asserting a statutory right to bail out from Section 5 coverage under the Act and, failing that, seeking a declaration that Section 5 is an unconstitutional exercise of congressional power. Travis County intervened to protect, against MUD usurpation, the County's role as the arm of local government authorized to determine whether to seek bailout under

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[7] While the state environmental agency exercises broad regulatory authority over municipal utility districts, none of that authority extends to the conduct of elections.

[8] The County also separately submitted and obtained preclearance of the 2004 joint election agreement. J.A. 411. The County draws a distinction between an election services agreement and a joint election agreement. An election services agreement is a long-term contract. J.A. 32 (election services agreement). In contrast, there is a separate joint election agreement with every participating jurisdiction for every election. MUD Summary Judg. Mot., Dkt. No. 99, Exh. 14 (DeBeauvoir Depo. at 35-36).

Section 4(a) of the Act, 42 U.S.C. § 1973b(a)(1), and, also, to defend the continued viability of Section 5 of the Act as an essential legal tool for ensuring that "minority voters in the County are afforded full and equal access to the electoral system for every government entity in the area." Travis County Intervention Mot, Dkt. No. 23, at 3.

The district court determined that the District was not statutorily entitled under Section 4(a) to seek bailout from Section 5 requirements and that Section 5 is a constitutional exercise of congressional enforcement powers under both the Fourteenth and Fifteenth Amendments. The court concluded that the MUD's lawsuit constitutes a facial challenge, but, as a precaution, considered two MUD arguments that might be construed as an as-applied challenge. J.S. App. 31-32. The court rejected both these arguments, J.S. App. 144-53, finding it "impossible to conclude that section 5 imposes any meaningful burden on the District," J.S. App. 153.

SUMMARY OF ARGUMENT

The 2006 VRA Reauthorization, extending the life of Section 5 and its preclearance requirements, is "appropriate legislation" within Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. The District which has launched the broad constitutional challenge does not register voters locally. It never has, and, under current state

law, it never will. The District's experience with the election process itself is uncommonly modest and narrow. In the two decades of its existence, it has conducted only one actual contested election, seven years ago in an election drawing less than a thousand votes, and, therefore, is institutionally inexperienced with the benefits that Section 5 coverage brings. It also has had little practical occasion to have to come to grips as a government with the often subtle or hidden threats to the integrity of election systems and operations that make Section 5's continued existence so important. The burdens it experiences from Section 5's continued existence are accurately described as "trivial" by the district court.

Travis County, which actually registers voters and conducts elections for itself and more than a hundred other local jurisdictions, is in a position to have a quite different perspective on the comparative burdens and benefits of Section 5 and its preclearance requirement. That experience leaves the County comfortable in concluding that Section 5 is far from being an anachronism.

Furthermore, the contrast between the MUD's limited electoral role and the County's close involvement in the machinery of elections, including the registration of voters and the maintenance and dissemination of the voter registration lists to local precincts, also highlights the wisdom in the 1982 congressional extension of the Section 4(a) bail-out option in covered states to the local jurisdictions responsible for conducting voter registration – but no

further. This legislative choice closely matches local electoral realities and duties.

Section 5 remains salient in Texas. Someday, experience may demonstrate that the balance has shifted and that the need for Section 5 has shrunk to the point that its modest burdens have come to outweigh the benefits it brings. By overwhelming margins, Congress concluded in 2006 that such a time had not yet come. Congress made the right decision.

ARGUMENT

Section 5 of the Voting Rights Act continues to provide benefits in covered jurisdictions, which outweigh the comparatively trivial burdens the statute imposes on local governments such as the MUD and the County.

The MUD seeks to remove what it characterizes as "the burden of federal preclearance." MUD Br. at 2. But, the MUD's role in elections, and the burdens it suffers under Section 5, are minute. Travis County, on the other hand, has a core role in elections, including the MUD's elections, and its perception of the relative benefits and burdens of the preclearance requirements of Section 5 differ markedly from the MUD's. As pointedly observed only recently, racial discrimination in voting is not a thing of bygone days and generations; instead, "[m]uch remains to be done to ensure that citizens of all races have equal

opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, ___ U.S. ___, slip op. at 21 (March 9, 2009) (plurality opinion). Section 5 remains essential to this unfinished task.

Travis County has long and intimate experience with the realities – the nitty-gritty – of election administration at the most personal levels. From this experience, Travis County is well acquainted with the vigilance that continues to be required to ensure that, where racial prejudice comes face-to-face with voters, the prejudice is trumped, muted, or suppressed, and the voters left free to give untrammeled expression to their democratic will. Section 5 of the Voting Rights Act is an invaluable tool the County uses – still uses – every election cycle to help tamp down or eliminate the insidious influence of racial discrimination. It is critically important that the County, and the many people it enlists each election to aid it in the complex task of administering elections, know that the burden rests with them, not voters who may experience discrimination and disenfranchisement, to ensure changes are non-discriminatory. Relying on Section 2 alone, and waiting, as the MUD urges, until after the discriminatory action is to wait too long.

Each individual election matters. The MUD touts Section 2 of the Act, 42 U.S.C. § 1973, as a sufficient guardian of the fundamental rights of minority voters, MUD Br. at 27, but this provision only offers the prospect of remedying discriminatory actions that

have already had an impact.[9] Section 5, on the other hand, offers the prospect of actually preventing discriminatory election actions from ever taking effect. Viewed in this, its proper light, Section 5 is more akin to preventive maintenance, and Section 2 to major repairs. It would undoubtedly prove more costly to the County to litigate a Section 2 case to conclusion (and, if found liable, remedy the violation), than to consider and address in advance – in the process of seeking and obtaining preclearance – the potential impact on minority voters of changes contemplated for the electoral system. If ever there were a circumstance where an ounce of prevention is worth a pound of cure, it is in the fundamental democratic event of conducting elections free of racially discriminatory actions.

In contrast to the County's wide experience and duties, the MUD has little knowledge of the realities of conducting elections and taking on the task of ensuring that the full range of the election process is as free of the impositions of racially discriminatory actions and threats as practically possible. The MUD has conducted just six elections on its own in its history, only one of which was contested and had more than a total of twenty votes cast. J.A. 394-98. It has not conducted any of its own elections since the spring of 2002. J.A. 398-400. It has never registered any voters.

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[9] "[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 128 S.Ct. 1970, 1985 (2008).

So, the MUD's experience with Section 5, the realities of voting, and the interaction of the two is hardly a meaningful counterweight to Travis County's, much less to the evidence Congress accumulated when it was considering the 2006 VRA Reauthorization. Even the MUD's professed concern about how, in 2031, it will "continue to be burdened" by Section 5's requirements, MUD Br. at 58, rings hollow. The MUD has little left to do in the way of governance; its bonds are in the process of being paid off. Five years after its bonded indebtedness is retired, the state environmental agency may dissolve the MUD, and, if by then it has not been annexed by the City of Austin,[10] its assets will escheat to the state. TEX. WATER CODE §§ 49.321, 49.327. It is not at all unreasonable to predict that the MUD's demise as a governmental entity will happen well in advance of the Section 5 extension's expiration.

Municipal utility district powers in general are tightly circumscribed under Texas law. First, the state constitutional grant of authority for the creation of such districts specifies a limit on their powers which the legislature cannot expand. *Deason v. Orange County Water Control & Improvement District No. 1*, 151 Tex. 29, 244 S.W.2d 981, 984 (1952) (addressing scope of the Texas Constitution's Conservation Amendment, Article XVI, § 59). Second, even legislative grants of power to these entities are read

[10] *See* TEX. LOC. GOV'T CODE § 43.074 (dealing with dissolution of in-city municipal utility districts upon annexation by home rule cities such as the City of Austin).

restrictively. *Tri-City Fresh Water Supply District No. 2 of Harris County v. Mann*, 142 Tex. 280, 142 S.W.2d 945, 948 (1940) (explaining that local water conservation districts only have powers that are clearly granted by the legislature and necessarily implied to effectuate the express powers and describing such districts as "low down in the scale or grade of corporate existence").

The combination of these fundamental state law limitations on the MUD's powers and the sheltered, circumscribed world it has carved for itself in the electoral sphere makes the MUD an unlikely symbol of a "burdened" local government overcome by the behemoth of Section 5. Section 5 has never prevented the MUD from timely implementation of a voting change. J.A. 22-23, 39-40, 59. It has spent virtually none of its resources on Section 5 compliance, J.A. 268-70, 272, 274, and it has virtually no familiarity of its own with the election process. It has never registered voters. Except for this litigation, the MUD's governing board has paid no meaningful attention to the nuts and bolts of Section 5 compliance. "I don't think I ever had one of the board members take a look at [a] submission," testified the attorney who had prepared all except one of the MUD's preclearance submissions. J.A. 51, 57-58. A former board president estimated that the board spent less than one-tenth of one percent of its time on Section 5 compliance and said that he recalled "flipp[ing] through" a draft submission once. J.A. 35-37.

It is for these reasons that the district court reached the well-founded conclusion that "the District's burden is trivial." J.S. App. 152.

In contrast, the County has to take into account a wide array of election-related responsibilities, especially with regard to voter registration activities and the conduct of elections. The County has had to exercise these election-related responsibilities over a time span much longer than the District's existence.

The current Travis County Clerk has served for the last twenty years, roughly two-thirds of the time that Section 5 has been applicable to Texas. MUD Summary Judg. Mot., Dkt. No. 99, Exh. 14 (DeBeauvoir Depo. at 21). She explained that, after these many years, with the County's development of settled administrative routines and familiarization with the rules governing Section 5, the process has become relatively quick and easy. *Id*. at 12.[11]

Thus, the County's experience stands in marked contrast to the MUD's in weighing the burdens and benefits of Section 5. There is a burden imposed by Section 5, but it is modest and has not proven at all

[11] "I do – I take the liberty of – of having a final review that my staff does, but it is so administrative and so rote by now, it's a fairly quick process. . . . My role is to provide correct information and explanations. Why did we move a particular polling place from a school to a church or vice versa? It could have been something like the – the building refused to house us because of the date of the election. It could be construction. It could be fire, rain. I mean, there could be any number of reasons we provide the explanation."

disruptive to the County's governance and administration of elections. The County has not drawn a Section 5 objection since at least the mid-eighties. *Id*. at 22.

On the other side of the scale, the County – not to mention its voters – receives benefits from the Section 5 preclearance process. The statute's valuable educational and deterrent effects aid the County and its election officials in administering their multifaceted election duties, for the County itself and the more than one hundred jurisdictions whose elections the County administers.

Moreover, the contrast in the experience and involvement of the MUD and the County in election administration highlights the congressional wisdom in its 1982 extension of the bail-out option in covered states to local jurisdictions, such as Travis County, that register voters. *See* J.S. App. 21-22 (district court discussion of 1982 amendments to Voting Rights Act to add Section 14(c)(2) political subdivisions to those eligible to seek Section 5 bail-out under Section 4(a)).

The County conducts the voter registration process for the whole County, it maintains and distributes the voter registration lists, it draws and redraws the precinct lines, and, by contract, it conducts elections for essentially all the other jurisdictions lying inside the County. In short, it is intimately familiar with the full gamut of the election process, putting it in a strong position to make assessments of whether the background factual circumstances exist

to seek bail-out and to make a considered judgment about whether seeking bail-out would be a beneficial step for the County. The MUD, with its limited range of authority and its truncated role in the election process, is hardly in an institutional position to make those kinds of assessments and judgments. It has no systematic way, and lacks the resources, to evaluate how the voter registration process – the historic key to the Section 5 coverage formula – is functioning in its own, small subdivision. This comparison of the institutional roles and capabilities of the County and the Board exemplifies at the local level why the 1982 congressional choice to extend the bail-out option to local jurisdictions which register voters, but no further, matches the reality of the way local government operates in the electoral sphere. There is no practical reason for engaging in the strained statutory interpretation urged by the MUD to extend the bail-out option beyond the bounds set by Congress.

In a leading Section 5 decision, the Court explained: "The abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). The County's experience is that Section 5's strictures continue to contribute in a positive way to making the right to vote, free of racial discrimination, a reality in the elections it administers. The tasks of encouraging citizens to register to vote and selecting polling locations may seem mundane and inconsequential in comparison to broader theories about the reach of congressional power and

federalism. But, from Travis County's perspective, Congress successfully melded the two concepts – the general and the particular – in the reauthorized Section 5. There remain solid reasons to keep Section 5 on the statute books. Congress was right to renew it. Its continued benefits outweigh the burdens, real or theoretical, ascribed to it.

CONCLUSION

The district court judgment should be affirmed.

Respectfully submitted,

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